JOWETT ZINYEMBA
versus
TAFADZWA NYAKAMHA
and
ALLEN CHAPAYA
and
MINISTER OF LOCAL GOVERNMENT PUBLIC WORKS AND NATIONAL HOUSING
and
PERMANENT SECRETARY FOR LOCAL GOVERNMENT PUBLIC WORKS AND NATIONAL HOUSING

HIGH COURT OF ZIMBABWE
MHURI J
HARARE, 7 & 14 March 2024

Opposed Matter

F T Mangiza, for the applicant
First respondent- represented by John Nyakamha
No appearance for the 2nd , 3rd and 4th respondents

MHURI J: The applicant approached this court seeking rescission of default judgment granted against him and in favor of the first respondent on 19 August 2020 under case number. HC 10389/17. The application is made in terms of R 27(1) of the High Court Rules, 2021 ('High Court Rules'). The first respondent's opposing affidavit was deposed by one John Nyakamha hereinafter referred to as John (the first respondent's father) by virtue of a general power of attorney to represent her. It is upon this background that the applicant raised issues over the opposing affidavit as being improperly commissioned and prayed that it be struck out as being irregular.

The facts of the matter are that the applicant became a member and/beneficiary of the "Start Paying for your House Scheme" which was run and managed by the third and fourth respondents. On 20 November 1998, he was allocated Stand No.6003 Dzivarasekwa Extension,

Harare measuring 200 square meters ("the property") whereas the first respondent purports to have been allocated the same property on the 26th of November 1998 when she was still a minor aged ten years. Immediately after allocation, the applicant took occupation and erected a three roomed house which is being leased out to third parties by the first respondent who is collecting rentals in the sum of US$210.00 per month since 2019.

Prior to the first respondent collecting the said rentals, the applicant had been in peaceful and undisturbed possession of the property until November 2017. The first respondent issued summons against the applicant under case number HC 10389/17 where she was claiming ownership of the said property. A default judgment was granted against him in October 2018 despite him entering an appearance to defend. The applicant then realized that the case number was erroneously cited as HC 16823/17 instead of HC 10389/17. He filed an application for rescission of judgment which was granted under case number 9420/18.

Another default judgment was granted against the applicant and in favor of the first respondent on 21 July 2022 under HC 1416/20. During this period applicant was in prison after he was convicted for fraud by a Harare Provincial Magistrate sometime in March 2020. His appearance to defend, plea and discovery papers were struck off the roll. The aforementioned judgment necessitated the granting of another default judgment against him and in favor of the first respondent in the main case under HC 10389/17 on 19 August 2020 which then necessitated the present application.

The applicant raised preliminary points in his answering affidavit namely:

- The first respondent's opposing affidavit contains averments which are hearsay in nature hence are inadmissible and as such there is no valid affidavit.
- That there is no valid opposition from the first respondent for want of compliance with the law on commissioning of affidavits.

I will in turn deal with these preliminary points.

Whether the first respondent's opposing affidavit contains averments which are hearsay in nature hence are inadmissible and as such there is no valid affidavit?

Hearsay evidence was defined in *Baron v Baron* HB 92/21where it was submitted that:

"Hearsay evidence is defined as evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence."

The general rule is that hearsay evidence is not admissible. The reason for the rule stems from the notion that the actual observer is not giving the evidence and therefore the credibility of such evidence cannot be tested or verified through cross examination. Rule 58 (4) (a) of the High Court Rules states that"

"(4) an affidavit filed with a written application-

(a) Shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out therein."

I take the view that the aforementioned rule reinforces the admissibility of hearsay evidence in applications. Exceptions to this rule are provided for in s27 (4) of the Civil Evidence Act [*Chapter 8:01*] which states that:

"(1) Subject to this section evidence of a statement made by any person, whether orally or in writing or otherwise shall be admissible in civil proceedings as evidence of any fact mentioned or disclosed in the statement, if direct oral evidence by that person of that fact would be admissible in those proceedings."

(4) In estimating the weight, if any, to be given to evidence of a statement that has been admitted in terms of subsection (1), the court shall have regard to all the circumstances affecting its accuracy……."

Mr *Mangiza* for the applicant submitted that the first respondent's opposing affidavit is defective in that it was attested to by John who is not the first respondent in this matter and is more like an agent acting in representative capacity. He further submitted that the opposing affidavit contained hearsay evidence and should be inadmissible because the deponent attested to something he did not witness. He submitted that John had not shown any evidence that he witnessed the events unfolding nor that he was present when the events were taking place. He highlighted in his heads of argument that John states that first respondent was allocated the property in 1998 but did not state that he was involved in the allocation process. He further averred that the first respondent took occupation in 1998 (when she was 10 years old) and he did not state that he was present when first respondent took occupation. He also states that several

developments were made on the property by the first respondent and payments were also made, but he did not state that he was involved in the process.

Generally, affidavits must be confined to such facts as the witness is able of his own knowledge to prove, except in interlocutory motions and urgent applications where hearsay evidence may be admissible (see *Jean Hiltunen* v *Osmo Juhani Hiltunen* HH 99/08). It is a settled principle in this jurisdiction that evidence on affidavit should be based on personal knowledge and not hearsay.

The applicant further avers that it is trite that the party cited in the matter should be the one to depose to the affidavit. The first respondent is in the country and has the capacity to depose to her own affidavit relating to her own case. In cementing his submissions, the applicant cited *Hiltunen* v *Hiltunen* (*supra*) p2 which states that:

> "I am unable to agree that the facts deposed to by the applicant's agent are within her personal knowledge. It is all hearsay evidence in my view. For instance, in paragraph 3 of the founding affidavit, she deposes that the respondent purported to note an appeal in the matter on March 2007. She does not aver that she was present when the appeal was noted for her to have direct evidence of the noting of the appeal. Further the deponent testifies as to the purchase of the immovable property in dispute by the applicant in 2002. She was not a witness to the agreement of sale. She does not indicate in the affidavit her source of information. She merely attaches the document to her affidavit, a feat that could have been accomplished by anyone to whom the story was told by the applicant. Again, in my view, that is hearsay."

Per contra, the deponent to the opposing affidavit John submitted that he has full appreciation of this matter as he was actively involved since 2008 when the dispute started and has been representing the first respondent since then. He submitted that he represented the first respondent in HC 544/20, HC 9420/18, HC 1416/20 and that the applicant has documents he was supposed to have produced which he did not to date. He argued that he was very familiar with the case and has full knowledge why the parties were in court hence his submissions in the opposing affidavit are not hearsay evidence.

The court notes in passing the fact that John has been representing the first respondent in a series of court cases regarding this matter since year 2000 to date and has been winning the previous cases. This fact is however immaterial to this present application. It has not slipped the court's mind that in the previous applications there was no challenge to John's representative capacity. It is not in dispute that although John now has personal knowledge and confirmation of the facts of the case, he did not indicate his source of information but rather made submissions

that he was there when the events unfolded. My reasoning finds authority in *Hiltunen v Hiltunen* (*supra*) p2 where it was stated that:

> "……..Further the deponent testifies as to the purchase of the immovable property in dispute by the applicant in 2002. She was not a witness to the agreement of sale. She does not indicate in the affidavit her source of information. She merely attaches the document to her affidavit, a feat that could have been accomplished by anyone to whom the story was told by the applicant. Again, in my view, that is hearsay."

It is clear from the rules of this court that John is in a position to depose of an affidavit under the veil of subparagraph (a) of R58 (4) of the High Court Rules which states that:

> "…...or by a person who can swear to the facts or averments set out therein."

Various authorities have disowned affidavits deposed on behalf of someone if the information is of a personal nature. This matter before the court is of a personal nature as it relates to personal property and requires details of the unfolding of events as it relates to double allocation and a serious battle for ownership of a piece of land (see *Beatrice Wakanyara* v *Tapiwa Wamambo* & 6 Ors HH 463/22).

Although John has the capacity to depose to the affidavit, the court is mindful that he has to provide a sufficient reason why the first respondent could not do so by herself. This point was raised by the applicant relying on *Levin* v *Saidman* 1930 WLD 256 where it was ruled that hearsay evidence in an affidavit is inadmissible in the absence of an explanation as to why direct evidence is unavailable. John made an oral submission that the first respondent is in this country but out of Harare at Gweru Thornhill Base, but he did not mention why she could not discharge this legal obligation by herself when she has the capacity to do so. The reason proffered by John is not sufficient to justify why the first respondent failed to depose the affidavit by herself.

Further John did not indicate his source of information and did not specify from whom he verified the facts not within his knowledge. There was a strict application of this principle in *Bubye Minerals (Pvt) Ltd and Anor* v *Rani International Limited* SC 60/60 where the Supreme Court dismissed an appeal on the sole basis that the deponent to the founding affidavit had no personal knowledge of transaction alleged in the affidavit despite the fact that the deponent had access to the company records and also consulted the companies' employees.

Herbstein and Van Winsen in *Civil Practice of the High Courts of South Africa* 5 ed, Vol.1 p444 states that where a deponent to an affidavit includes information that he does not have

first-hand knowledge of, a verifying affidavit must be filed. John did not file a verifying affidavit to that effect. It is trite that an application can fall or stand on its opposing affidavit because those are the facts upon which the respondent is called upon to affirm or deny (see *Ndoro & Anor* v *Conjugal Enterprises (Pvt) Ltd & Anor* HH 814/22).

I therefore uphold the preliminary point. The evidence deposed by John is not within his personal knowledge of the facts of the case hence inadmissible.

Whether there is no valid opposition from 1st respondent for want of compliance with the law on commissioning of affidavits?

In terms of *Ex Officio* Commissioners of Oaths: Designation Notice, Statutory Instrument 648 of 1983, a Member in Charge of a police station is indeed a commissioner of oath. The opposing affidavit by John is alleged to have been commissioned by a Member in Charge stationed at Harare High Court police post. The applicant argued in his answering affidavit that the affidavit failed to indicate that the person who commissioned is a commissioner of oaths and that he discharged such duty in that capacity. The stamp merely stated that, "Member in Charge, Criminal High Court, Zimbabwe Republic Police." The issue for consideration is whether what has been alleged by the applicant renders the affidavit defective. The applicant relied on *First Cellular (Pvt) Ltd v Netone Cellular (Pvt) Ltd* SC 1/2015 wherein PATEL JA stated that:

> "It is common cause that there is no specific legislation regulating the issue in this jurisdiction and that the matter is one that is governed by practice. In that regard, what is required is that any stamp that is used to designate a commissioner of oaths should clearly identify the person before whom an affidavit is deposed and the office or capacity in which he or she acts as a commissioner."

In opposition, the first respondent argued that the stamp is authentic and the opposing affidavit was properly commissioned by a Member in Charge stationed at Harare High Court police post where lawful activities are done and if the applicant could have suspected forgery, he should have made a report to that effect and prove that the person who commissioned the affidavit was not supposed to. I find merit in the argument by the first respondent that the stamp is authentic and as per *First Cellular* judgement (*supra).* The stamp does identify the person who commissioned the affidavit by his office as the Member in Charge at the High Court Criminal Division and there is only one person holding such office and who discharge such duty. It is

common knowledge that at every police station or post there will be a Member in Charge who will be a commissioner of oaths.

The applicant in his heads of argument argued that the stamp does not indicate that the person is a commissioner of oaths. It is common practice that their stamps are generated from the Police and in commissioning of affidavits, one stamp is used which identifies the person commissioning by his office as the 'Member in Charge' and the police post that he or she is stationed at 'Criminal High Court'. Such reasoning found authority in In *Toverengwa Marega* v *The Commissioner General of Prisons and the Trial Officer* HH 140/17 where TAGU J (the late) ruled that:

> "I agree with counsel for the respondents that the affidavit deposed to by the respondents is valid as it was commissioned by a member of the Public Service whose primary interest in the affidavits is that of the state. The second point is dismissed."

I am persuaded that the stamp on first respondent's affidavit is authentic as it is from the police.

The applicant indeed acknowledged that there is a signature on the stamp although he claimed that it is not very visible. The applicant's argument is centered on visibility of the signature trying to create an impression that the signature might have been forged. The probability of the signature being a forged one when the stamp on face value seems authentic is very slim. Less visibility of the signature cannot be attributed to forgery. In these circumstances the court cannot however authenticate whose signature it belongs to, but it is guided by the authenticity of the stamp.

The applicant in his heads of argument further submitted that the first respondent signed the opposing affidavit on the second of August 2023 and the purported commissioner of oaths endorsed a date a day after on 3 August 2023. The issue revolves around a computer-generated date on John's opposing affidavit versus a handwritten date he inserted when he was correcting the date. The applicant is of the view that the first respondent attempted to temper with the date. In cementing his argument, he cited *Mike Mandishayika* v *Maria Sithole* HH 798/15 where it was stated that:

> "An affidavit is a written statement made on oath before a commissioner of oaths or other person authorized to administer oaths. The deponent to the statement must take the oath in the presence of the commissioner of oaths and must append his or her signature to the document in the presence of the commissioner. Equally the commissioner must administer the oath in accordance

> with the law and thereafter must append his or her signature onto the statement in the presence of the deponent. The commissioner must also endorse the date on which the oath was so administered. These acts must occur contemporaneously."

Per contra, John made a concession that he inserted a third on the typed date and appended his signature on the opposing affidavit and did so in the presence of the commissioner of oaths. This creates an impression that John might have drafted the affidavit on the second of August and then took the oath before the commissioner of oaths the following day on the third. The question before the court is whether fixing the date on the stamp by John renders the opposing affidavit defective? The issue has been clearly articulated in *Mandishayika* case (*supra)* where CHITAKUNYE J (as he then was) ruled that it is the commissioner of oaths after administering the oath who then endorses the date on the affidavit. An act by John of altering the computer-generated date invalidates the affidavit rendering it improperly commissioned. It then boggles one's mind on how the commissioner of oaths can leave John altering the computer-generated date. In *Mandishayika* case an affidavit was rendered invalid due to the differences in the dates of signing of the affidavit by the deponent *vis a vis* the date the affidavit was commissioned and the court had this to say:

> "In case, the deponent signed the deposition on a different date and the commissioner commissioned it several months after that. There is no assurance that the deponent signed in the presence of the commissioner or even that he ever took the requisite oath. Clearly the affidavit was not properly commissioned and should not have been accepted as an affidavit. …."

There is a plethora of cases on the dangers of accepting an improperly commissioned affidavit. In *Ndoro & Anor* v *Conjugal Enterprises (Pvt) Ltd & Anor* HH 814/22 DEME J ruled that:

> "Thus, there are many dangers of accepting an improperly commissioned affidavit. It is apposite that there must be strict adherence to the proper methods of commissioning affidavits. Any compromise would bring justice into disrepute." (see also *Tawanda* v *Ndebele* HB27/06)

All having been considered, I find that the points *in limine* were well taken and I uphold them. I find that the first respondent's opposing affidavit is fatally defective and strike it from the record, the result is that there is therefore no opposing affidavit before this court. To that end, the matter proceeds as unopposed.

Applicant's prayer was that the application be granted. It is, in the result ordered that:

1. The application for rescission of default judgment granted under HC 10389/17 be and is hereby granted.
2. The first Respondent shall apply for set down of Pretrial Conference within 10 days from the date of this order.
3. There shall be no order as to costs.

G S Motsi Law Chambers, applicant's legal practitioners